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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-439

BRIDGEPORT HYDRAULIC COMPANY, et al.,
Appellants,

v.

THE COUNCIL ON WATER COMPANY LANDS OF THE STATE OF CONNECTICUT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Jurisdictional Statement

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September 15, 1978

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Jurisdictional Statement

Appellants Bridgeport Hydraulic Company, Litchfield Water Company and The Hydraulic Company appeal from the judgment of a three-judge court of the United States District Court for the District of Connecticut, entered on June 19, 1978[1]. Appellants appeal as to that part of the judgment which disposed of Counts I and II of their Complaint and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

[1] The appellees are identified in Appendix A.

Opinion Below

The opinion of the three-judge court for the District Court for the District of Connecticut is unreported. Copies of the Opinion, the Judgment and the Notice of Appeal are attached hereto as Appendix B.

Jurisdiction

This suit was brought under 28 U.S.C. §§ 1331 and 1343 to enjoin as unconstitutional the enforcement of certain Connecticut statutes and regulations of statewide applicability. The judgment of the District Court was entered on June 19, 1978, and a notice of appeal was filed in that court on July 17, 1978. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. Counts I and II were dismissed after consideration of their constitutional merits.

Statutes Involved

1977 Connecticut Public Act 606 Secs. 1-3, replacing 1975 Connecticut Public Act 405 and Connecticut General Statutes § 25-32; Connecticut General Statutes § 16-22. The pertinent parts of those statutes are set forth in Appendix C.

Questions Presented

A. Did Connecticut deprive plaintiffs of due process and equal protection of the laws when it enacted legislation which classifies land according to certain physical characteristics and prohibits public utilities from selling or otherwise disposing of land within certain of those categories without: (1) imposing the same restrictions on land within those categories owned by persons other than public utility companies; and (2) compensating plaintiffs for the *de facto* taking of their property effected by that legislation?

B. Did Connecticut deprive plaintiffs of due process and equal protection of the laws when it enacted Connecticut General Statutes § 16-22, which requires public utilities to demonstrate that their proposed transfer or other disposition of real estate is in the public interest without: (1) requiring a similar showing by any other persons desiring to transfer real estate in the State of Connecticut; and (2) compensating plaintiffs for the *de facto* taking of their property produced by that legislation?

Statement

Appellants Bridgeport Hydraulic Company and Litchfield Water Company are privately owned water companies supplying water to customers in Litchfield and Fairfield Counties in the State of Connecticut. Litchfield Water Company is a subsidiary of Bridgeport Hydraulic Company, which itself is a subsidiary of appellant The Hydraulic Company.

Bridgeport Hydraulic Company and Litchfield Water Company own a number of reservoir systems, including water bodies, watershed land[1] immediately surrounding the reservoirs, land off the watershed but contiguous to watershed property, and land abutting certain streams feeding those reservoirs. These companies do not own all of the land surrounding their reservoirs or the feeder streams. Two-thirds of such land is owned by non-utilities.

In 1975 water company land became the subject of a number of special statutory enactments in Connecticut. Chief among these was 1975 Public Act 405[2] which created the Council on Water Company Lands and imposed a two-year moratorium on any development or disposition of unimproved real estate owned by a private water company. During the pendency of this action that statute was replaced by 1977 Public Act 606[2] which divided the land holdings into three classes, depending upon their physical charac-

[1] Watershed land is land draining into an active source of public water supply.

[2] Sometimes referred to herein as the "Moratorium Act."

teristics. Land falling within Class I can never be developed or sold. Land falling within Class II is subject to an ongoing moratorium and the State Commissioner of Health is authorized to adopt regulations under which to evaluate any proposed dispositions of Class II land. The moratorium is to remain in effect until the earlier of the date such regulations are adopted or June 26, 1979. Class III land was released from the moratorium.

The Connecticut legislature also adopted a statute which requires that a public service company demonstrate that a proposed transfer of surplus land be "in the public interest." *Connecticut General Statutes* § 16-22. This requirement is independent from any determination that the real estate is truly surplus to a water company's performance of its duties to supply an adequate supply of pure water to its customers. If more than $20,000 of value is at issue, a public hearing must be held. *Connecticut General Statutes* § 16-50c.

This action was commenced on July 2, 1975, seeking *inter alia* a preliminary injunction against the operation of the Moratorium Act and *Conn. Gen. Stat.* § 16-22 on the basis that both constitute uncompensated takings of plaintiffs' property, denying the plaintiffs due process and equal protection of the laws in violation of the Fourteenth Amendment. Plaintiffs' application for a three-judge court was granted on December 12, 1975.

The three-judge court issued its memorandum of decision on December 29, 1977. The court concluded that the Moratorium Act, as extended by the 1977 legislation, "falls within the permissible scope of the State's police power and does not unconstitutionally trench on plaintiffs' protected interests." Memorandum of Decision at p. 7a. The court appears to have based that decision on a finding that moratorium was temporary and reasonably related to a public health objective within the police power. The court dismissed the plaintiffs' challenge to *Connecticut General Statutes* § 16-22 without discussion, stating: "We consider the enactment to be a lawful exercise of the state's police power." Memorandum of Decision footnote 4, p. 23a.

The Questions are Substantial

The issues involved in this appeal are similar to those confronted in *Penn Central Transportation Company* v. *City of New York*, 46 U.S.L.W. 4856 (1978). The points of distinction between that case and the present case point out the error of the district court in failing to find that the Moratorium Act and Connecticut General Statutes § 16-22 work a confiscation of plaintiffs' property in violation of their rights to due process and equal protection of the laws.

The Landmark Preservation Law of New York City involved in *Penn Central Transportation Company* v. *City of New York* had the effect of eliminating Penn Central's ability to make the most intensive use of the parcel occupied by Grand Central Terminal. In rejecting the appellants' contention that the law effected a taking of their property, this Court refused to treat the "air rights" above the Terminal as a discreet property right apart from the balance of the property rights in the underlying parcel. Noting that the New York City law did not impair the present use of the Terminal, this Court found no basis for distinguishing the case from other cases involving governmental regulation which significantly diminished the value of the affected land, but not to the point where a taking of the entire property had occurred.

In measuring the impact of the law upon the plaintiffs, this Court took note of provisions of the Landmark Preservation Law which rendered the air rights transferable to other parcels in the vicinity of the Terminal. This Court also noted that the rejection by the Landmarks Commission of an application for a 50 story office tower did not rule out lesser or different uses of the air rights and concluded:

> "On this record... the application of New York City's Landmark Preservation Law has not effected a 'taking' of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford appel-

lants opportunities further to enhance not only the Terminal site proper but also other properties." 46 U.S.L.W. at 4865.

The plaintiffs there also made an equal protection argument, contending that designation of a landmark "is inevitably arbitrary or at least subjective because it basically is a matter of taste." 46 U.S.L.W. at 4864. The Court found the argument had "a particularly hollow ring" given the fact that the landmark designation had not been challenged under the procedures available in the Landmark Act. The Court concluded that the landowner could vindicate its equal protection right in judicial review of any Commission decision, noting:

> "When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land use plan, and will include consideration of the treatment of similar parcels. . . . When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur." 46 U.S.L.W. at 4864, n.29.

The factors that saved the Landmark Preservation Law are absent in the Connecticut legislation. The Moratorium Act flatly prohibits any development or disposition of Class I lands and imposes a moratorium against development or sale of Class II lands pending adoption of regulations by Connecticut's Department of Health to govern applications for development or disposition.[1] Thus, this is not a case where an owner is being prevented from extending an already profitable development of his property, but rather involves an absolute prohibition against profitable development or disposition of real estate. Unlike the Landmark

[1] The moratorium expires at the earlier of the adoption of those regulations or June 26, 1979.

Preservation Law, there is no compensating provision for transferring development rights to other properties. Plaintiffs' rights have been taken as effectively as they were in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413-415 (1922).

The second constitutional infirmity of this legislation is that it denies appellants the equal protection of the laws. The purported purpose of the Moratorium Act is to preserve undeveloped watershed property and buffer zones around the watershed property to gain whatever benefit they may have in assuring the adequacy and purity of public water supplies. But the legislation does not apply to all land having watershed and buffer zone physical characteristics. It only applies to land owned by utilities. The State's own expert witness from Connecticut's Department of Health acknowledged that appellant Bridgeport Hydraulic Company owned only approximately one-third of its watershed and that private land owners hold land in critical watershed areas.

The Moratorium Act fails to accord plaintiffs equal protection.

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920)." *Reed* v. *Reed,* 404 U.S. 71, 76 (1971).

The risks posed by development of property adjoining Connecticut's water supplies are the same whether that property is owned by a utility or a non-utility. Since the legislation singles out a class of owners, rather than a type of property, it is arbitrary and cannot rest upon a distinction having a fair and substantial relation to public safety.

The denial of due process is even more striking in the case of *Connecticut General Statutes* § 16-22. Section 16-22 requires that at any hearing involving a transfer of owner-

ship of assets of a public service company the public service company has the burden of proving that the transfer of assets "is in the public interest." Another statute, § 16-50c, requires that a hearing be held on a public service company's application for approval for the disposition of any parcel of unimproved real estate containing three or more acres, when "the acquisition cost of the parcels involved, or the transfer consideration, is in excess of twenty thousand dollars."

The "public interest" referred to in § 16-22 does not have reference to the public interest in adequate utility service. In Connecticut the determination of whether land intended for sale is truly surplus to the operations of a utility is made by the Public Utilities Control Authority under authority granted in Connecticut General Statutes § 16-43(1), in conjunction with the Health Department pursuant to its authority under § 25-32.[1] Thus, the public interest referred to in § 16-22 has reference to an interest other than the interest in adequate utility service. But the only distinguishing feature between the plaintiff water companies and any other owner of unimproved land in the State of Connecticut is their status as public utilities. Imposing burdens on the disposition of assets of public utilities which bear no reasonable relation to their public utility service functions constitutes an invidious discrimination, denying them equal protection of the law.

Because the public interest in adequate utility service is protected by other statutes and regulations, the "public interest" in § 16-22 must have reference to the intended future use of the property. The public service company status of the seller has no fair and substantial relationship to the intended use of the property by the buyer. Since it is the future use which may impact on the public interest, then the statute should apply alike to all holders of undeveloped land in the State of Connecticut. Prospective use

[1] Connecticut General Sttautes § 16-43(1) is set forth in relevant part, in Appendix D; § 25-32 is set forth in Appendix C.

of any undeveloped land may impact on the "public interest", yet, as was stipulated at trial, approximately 97% of Connecticut's unimproved land is not subject to § 16-22. Thus, the classification is arbitrary and the statute is condemned under the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, the vagueness of the "public interest" transfer test condemns it as a denial of procedural due process. Due process requires that the affected party be given notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972). Since the outcome of a hearing required by § 16-22 may be a denial of the plaintiffs' rights to sell their property — the only value inherent in property which is no longer useful in utility service — fundamental due process must be accorded to the plaintiffs in the hearing. *Fuentes* v. *Shevin,* 407 U.S. 67, (1972); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). But, the unknown parameters of what constitutes the "public interest" in the context of § 16-22 effectively denies plaintiff meaningful notice, and hence a meaningful opportunity to be heard.

Finally, the undefined "public interest" transfer test also constitutes a substantial cloud on the title of the plaintiffs to their real property. At trial plaintiffs introduced substantial uncontradicted expert testimony that the presence of § 16-22's burden of proof effectively deprives the plaintiffs of a public market for their surplus real estate. Prospective buyers will not invest the time and money necessary to determine the suitability of a parcel for their desired use if faced with the substantial doubt that the parcel will ever be made available to them. The value of the land is destroyed. The plaintiff utilities are left with the burdens and none of the benefits of ownership. Under the analysis employed by this Court an uncompensated taking has occurred. *See, Penn Central Transportation Company* v. *City of New York,* 46 U.S.L.W. 4856, 4861-4863 (1978).

In summary, appellants raise substantial constitutional issues which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A — APPELLEES

COUNCIL ON WATER COMPANY LANDS OF THE STATE OF CONNECTICUT; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CONNECTICUT; HOWARD E. HAUSMAN, THE DEPARTMENT OF FINANCE AND CONTROL OF THE STATE OF CONNECTICUT; HORACE BROWN, THE DEPARTMENT OF HEALTH OF THE STATE OF CONNECTICUT; DOUGLAS S. LLOYD, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF CONNECTICUT; JOSEPH N. GILL, THE TOWN OF BEACON FALLS, CONNECTICUT; MARIO G. FUOCO, THE TOWN OF BETHEL, CONNECTICUT; FRANK CLARKE, THE CITY OF DANBURY, CONNECTICUT; CHARLES A. DUCIBELLA, THE TOWN OF EASTON, CONNECTICUT; FRANCES J. MERILLAT, THE TOWN OF FAIRFIELD, CONNECTICUT; JOHN J. SULLIVAN, THE TOWN OF MONROE, CONNECTICUT; JOHN J. DESMOND, THE TOWN OF NEWTOWN, CONNECTICUT; FRANK R. DELUCIA, THE TOWN OF OXFORD, CONNECTICUT; J. RICHARD UNTIED, THE TOWN OF REDDING, CONNECTICUT; JESSE P. SANFORD, THE TOWN OF SEYMOUR, CONNECTICUT; ANNA L. LOPRESTI, THE CITY OF SHELTON, CONNECTICUT; FRANCIS K. KELLY, THE TOWN OF TRUMBULL, CONNECTICUT; JAMES A. BUTLER, THE TOWN OF WESTON, CONNECTICUT; BARBARA WAGNER, THE TOWN OF WESTPORT, CONNECTICUT; JACQUELINE P. HENEAGE, THE TOWN OF LITCHFIELD, CONNECTICUT; ROBERT D. COOLEY, THE TOWN OF GOSHEN, CONNECTICUT; RICHARD C. KOBYLENSKI, THE TOWN OF NORTH CANAAN, CONNECTICUT; LEO R. SAGALLA, THE TOWN OF NORFOLK, CONNECTICUT; JOHN J. CURTISS, THE TOWN OF CANAAN, CONNECTICUT; MILES L. BLODGETT, THE TOWN OF SALISBURY, CONNECTICUT; CHARLOTTE H. REID, THE TOWN OF CORNWALL, CONNECTICUT; KENNETH A. MERZ.

APPENDIX B

Memorandum of Decision, Judgment and Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

BRIDGEPORT HYDRAULIC COMPANY, et al,
Plaintiffs,

v.

THE COUNCIL ON WATER COMPANY LANDS OF THE STATE OF CONNECTICUT, et al,
Defendants.

CIVIL No. B-75-212

Before:

SMITH, *Circuit Judge*, ZAMPANO and NEWMAN, *District Judges*

Memorandum of Decision

ZAMPANO, *District Judge:*

This action challenges the constitutionality of certain statutes and regulations affecting public utility companies which were enacted by the State of Connecticut during the last five years. The claim is made that these enactments have substantially impaired, if not destroyed, the effective management of these companies and have usurped their property for the general public benefit without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The plaintiffs are five private, investor-owned Connecticut water companies (Litchfield, Norfolk, North Canaan,

Lakeville and Cornwall Water Companies), their parent company (Bridgeport Hydraulic Company), and its holding company (The Hydraulic Company). The New Haven Water Company was permitted to intervene as a plaintiff solely with respect to Count IV. The defendants include the Council on Water Company Lands ("Council"), the Public Utilities Control Authority ("PUCA"), the Departments of Finance and Control, Health, and Environmental Protection, and numerous towns of the State in which the plaintiffs own real estate.

The six-count complaint, as amended, seeks declaratory and injunctive relief pursuant to the provisions of 42 U.S.C. § 1983, with jurisdiction premised on 28 U.S.C. §§ 1331 and 1343. Because an injunction restraining the enforcement of state statutes and regulations on grounds of unconstitutionality is sought, a three-judge district court was convened under 28 U.S.C. §§ 2281 and 2284.[1]

I

The plaintiffs first assert that the enforcement of Public Act 75-405, the so-called Moratorium Act, in effect since June 25, 1975, and extended for another two-year period by the 1977 legislature, Public Act 77-606, deprives them of their property without due process of law.

The Act empowers the Council to undertake certain activities, including *inter alia:*

(1) The promulgation of criteria for determining whether any water company lands should be considered surplus property with due regard given to the purity and adequacy of present and future water supply and whether any such surplus lands may be suitable for recreation or open space use;

(2) The establishment of policies and procedures to assist municipalities in acquiring the surplus lands for community use;

(3) The issuance of recommendations concerning executive and legislative action governing the disposition of water company property; and

(4) The development of provisions for the long term acquisition of the surplus lands by the State or municipalities, and for a restriction of the percentage of land within a given municipality which a water company may sell in a specified period without approval.

In addition, Section 2(a) of the Act placed a two-year moratorium, with certain limited exceptions,[2] on the development or sale of all parcels of unimproved real property in excess of three acres owned by water companies. As stated, the moratorium was extended for another two years by the legislature on June 26, 1977.

The plaintiffs contend that this statutory scheme is confiscatory in its operation and constitutes a taking without just compensation. They point out, among other things, that they own thousands of acres of land which in their opinion are presently or after the installation of filtration facilities will no longer be useful to the water supply business. They argue that their plans to dispose of this property at substantial gains over the original cost and book value are effectively blocked by the legislation and, therefore, they have become uncompensated custodians of *de facto* public land in contravention of the protections of the Fifth and Fourteenth Amendments. Cf. *Pumpelly* v. *Green Bay Company*, 80 U.S. (13 Wall.) 166, 177-178 (1871); *Trager* v. *Peabody Redevelopment Authority*, 367 F. Supp. 1000, 1002 (D. Mass. 1973) (three-judge court).

Certain controlling principles guide our determination of the issue presented. Subject to specific constitutional limitations, the enactments in question come to us clothed with a presumption of validity. *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529 (1959). To be sustained, legislative regula-

tory pronouncements in the public interest need only be found to be within the perimeters of what traditionally is known as the state's police power. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). In the exercise of that power, the legislature has broad and flexible authority, particularly in the areas of public health and safety. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 595 (1962); *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 391 (1926). So long as the legislation bears a real and substantial relation to a legitimate state purpose and the means of enforcement are reasonable, judicial intervention is not warranted. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974); *Sproles* v. *Binford*, 286 U.S. 374, 388 (1932); *Maher* v. *City of New Orleans*, 516 F.2d 1051, 1058-1059 (5 Cir. 1975).

Applying these standards, it is evident that the statutes before us reflect a permissible exercise of the police power and not an arbitrary interference with private rights. While it is true that the moratorium on the sale of water company lands may affect the plaintiffs' opportunities to reap immediate net profits, that fact alone fails to give rise to any constitutional infirmity. As stated in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 424 (1952): "Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization." The overriding consideration is the State's power to regulate the disposition of plaintiffs' lands — to the limited extent set forth in the legislation at issue — while acting in furtherance of its desire to preserve and insure the quality of one of its most crucial resources.

At the outset we note that the enactments under review do not prohibit the sale of plaintiffs' lands absolutely. Water companies are free to seek an exception to the moratorium on sales by requesting the written approval of the Council and the chief executive officer of the municipality in which the property is located. Neither may withhold permission

arbitrarily or unreasonably; both must accord the plaintiffs due process of law with respect to any application to sell a particular parcel of land. See Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 *et seq.; Gohld Realty Co.* v. *Hartford,* 141 Conn. 135, 146 (1954).

In any event, the expansive record before us demonstrates that the obvious purpose of the legislation is the protection of the health and welfare of the State's inhabitants. By providing that there can be no massive divestitures of watershed and off-watershed lands the State is insuring the ability of the water companies to provide pure water to its customers.

Both watershed and off-watershed properties are critical to water purity. Watershed areas reduce the impact of point and non-point sources of pollution;[3] off-watershed lands act as a buffer zone to reduce risk of contact with these pollution sources. Thus any significant sales of a water company's properties do present the potential for seriously reducing the existing protections of the State's water supplies. Moreover, it is evident that such sales might include subsequent commercial development which could endanger the remaining water supply areas by creating an increase in the amount of pollutants potentially capable of being washed into those supplies.

In response, the plaintiffs' submit that no health hazards will be created by their contemplated sales because they rest assured that their water treatment facilities more than adequately protect the public and that any sale of property must pass muster before the Department of Health under other statutes and regulations. See, e.g., Conn. Gen. Stat. § 25-32(b). However, the record discloses that there is considerable controversy over the effectiveness of present water treatment facilities and the adequacy of the present guidelines utilized by the Department of Health. The extensive testimony of experts and documentary evidence presented to this Court clearly demonstrate that in-

numerable factors must be considered and weighed in order to resolve the dispute concerning the feasibility of the sales of water company lands. The place for a definite determination of the controversy is the legislature and not the judiciary. Cf. *East New York Bank* v. *Hahn,* 326 U.S. 230, 234 (1945).

We are also persuaded that the procedures designated in the legislation are reasonable. The enactments, passed after studious debate, carefully address the problem of the nature and sufficiency of the existing water supplies in relation to land divestiture plans and construction of filtration projects proposed by the State's water companies. Specific areas for research, surveys and investigations are set forth; detailed reports pursuant to ascertainable standards are required to be submitted to the legislature. Pending remedial legislation, the temporary restrictions imposed on the sale of water company lands merely safeguard against potential dangers envisioned by the legislature. We find no cogent reason to reverse the considered judgment of the legislature to preserve to a limited extent the status quo of water company lands while it studies in greater detail the feasibility of protective legislation for the future.

We therefore, conclude that the legislation in question falls within the permissible scope of the State's police power and does not unconstitutionally trench on plaintiffs' protected interest. Cf. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-488 (1955); *East New York Savings Bank* v. *Hahn,* supra; *Pacific States Box and Basket Co.* v. *White,* 296 U.S. 176, 185-186 (1935); *Walls* v. *Midland Carbon Co.,* 254 U.S. 300, 319 (1920).

II

The plaintiffs' attack on the Option Statute, as amended by the legislature in 1975, *Conn. Gen. Stat.* § 16-50d, presents a troublesome issue of statutory construction.

The purpose of the statute, first enacted in 1967, was to establish a procedure whereby the State or a municipality had the first "option" to purchase land in excess of three acres being offered for sale by a public service company before that parcel could be sold to a private party on the open market. Excluding stated time limitations, the statutory scheme provided that: (1) the company was required to give notice of its intention to sell the land to the Public Utilities Commission (the predecessor of the PUCA), the Commissioner of Environmental Protection, and the chief executive officer of the municipality in which the property was located; (2) the PUC would then approve or disapprove the sale; (3) if the sale were approved, the State and municipality had the option to acquire the land; and (4) if the option were exercised by either of the governmental bodies, the parties had a specified period of time to agree upon a price or the matter would be referred to the condemnation process.

Each step set forth in the Opinion Statute contained a designated time span for action, with express provisions for waiver if the State or municipality failed to act within the limitation periods. From time to time since 1967, the legislature changed these time requirements. Prior to the 1975 Amendments, the PUC had 150 days to approve or disapprove the sale and, if approved, the State or municipality had 90 days to exercise its option to buy. Thus the company's plans for the sale of the property could not be delayed more than 240 days or eight months due to the operation of the Option Statute. Since it was unlikely that expert appraisals would radically change within an eight-month span, the plaintiffs have no quarrel with a disruption of their sales program for this period of time.

However, in 1975 the legislature revised the procedures under the Option Statute as follows: (1) after the initial notification of an intention to sell land by a public service company, the PUCA has five months to approve or disapprove, § 16-50c; (2) if there is an approval, the State or municipality has three months to indicate a desire to obtain the property, § 16-50d(a); (3) a failure to thus exercise the option to purchase results in a waiver of the right to acquire the land, § 16-50d(b); (4) upon notice of an exercise of the option, the company "within eighteen months . . . shall sell the land to the municipality or the state, as the case may be, . . . or, if the parties cannot agree upon the amount to be paid therefor, the municipality or the state may proceed to acquire the land in accordance with the procedure prescribed in section 48-12 (condemnation)," § 16-50d(c); and (5) "if the municipality or the state fails to acquire the land or to prefer a petition (for eminent domain) within ninety days" after the § 16-50d(a) notice, the governmental body waives its right to acquire the property, § 16-50d(d).

It is clear that the 1975 Amendments grant the PUCA five months to approve or disapprove the proposed sale under § 16-50c, and, in the event of approval, allow the governmental bodies three months to consider the feasibility of purchase under § 16-50d(a). However, it is also obvious that the remaining subsections of the statute, which govern actual acquisition of the property, are facially ambiguous and inconsistent. Subsection (c) declares that the State or municipality has 18 months after the preliminary study period of eight months to obtain the property by sale or condemnation, while subsection (d) recites that the State or municipality waives its right to acquire the land if it fails to acquire the property by sale or condemnation within three months following the eight-month study period.

The plaintiffs contend that the 1975 Amendments now permit a possible delay of 26 months (eight months for study plus 18 months to acquire) from the date of the initial decision to sell land to the time the sale must be consummated. They submit impressive evidence that the 26-month period is unreasonable and effectively destroys the market-

ability of their property. As stated by Mr. Donald Loiselle, one of plaintiffs' experts,:

> Appraisals are always made at the current market value as of the date made. Two years from that date the appraisal is no longer valid. If the market continues to ascend the way it has in the past many years, the appraisal will be too low at the end of the 26 month period, so that we cannot sell at the appraised price unless we want to sell below market and our mortgage indenture says we have to sell at current market value in order to get the land freed from the mortgage indenture, so we get into a vicious circle on this.
>
> Loiselle Deposition pp. 66-67.

While the plaintiffs interpretation logically conforms to the language of four provisions of the statute (sections 16-15c, 16-15d(a), 16-15d(b) and 16-15d(c)), it renders nugatory the three month mandate of subsection (d). It is axiomatic that a court should not construe a statute in a way that emasculates one of its provisions, cf. *Marsano* v. *Laird*, 412 F.2d 65, 70 (2 Cir. 1969); see also *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955), or that may result in a finding of unconstitutionality in its operation. *Quinn* v. *Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975); *Lee Fook Chuey* v. *Immigration & Naturalization Service*, 439 F.2d 244, 249 (9 Cir. 1971); cf. *Knapp* v. *McFarland*, 462 F.2d 935, 939 (2 Cir. 1972).

The defendants, on the other hand, do not seriously contest that a 26-month option period would be unjust, illogical and arbitrary. (Defendants' Brief p. 35). However, they assert that the amendments permit only an 11-month option time. The two-fold argument is that: (1) subsection (d) requires the State or municipality to make a legally binding commitment to exercise the option within

three months following the eight-month study period; and (2) the additional 15 months under subsection (c) is available solely to work out "ministerial" problems, including price, bonding, etc. Although this analysis would save the statute from constitutional infirmity, it blinks at reality. Price and terms are hardly "ministerial" in nature — they involve the most critical components of a contract to purchase land. In addition, the defendants' rationale completely disregards the explicit language of subsection (c) which mandates a sale or a petition for condemnation "within eighteen months" after subsection (a) notice. It is a settled maxim of statutory construction that all provisions of an enactment are intended to have meaning, and words of a statute are not to be construed as surplusage. Cr. *McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938); *Wilderness Society* v. *Morton*, 479 F.2d 842, 856 (D.C. Cir.) (*en banc*), cert. denied, 411 U.S. 917 (1973). We also note legislative history of the amendment to subsection (c) is meager and furnishes no definitive reference to aid in the resolution of the conflict. Compare *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534-544 (1940); *Schwartz* v. *Romnes*, 495, F.2d 844, 849 (2 Cir. 1974).

Under these circumstances, we find there are valid reasons to invoke the doctrine of abstention. First, it is evident that to adjudicate the federal constitutional claim, we must fix the extent of the acquisition term for the State and municipalities under the Option Statute. Since the statute is susceptible to varying constructions which would significantly alter the nature of the constitutional question, a decision by the state court will undoubtedly obviate the need for a federal judgment. *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); *Reid* v. *Board of Education of the City of New York*, 453 F.2d 238 (2 Cir. 1971); *Hamar Theatres, Inc.* v. *Cryan*, 393 F. Supp. 34 (D.N.J. 1975).

Second, a decision by this Court concerning whether the governmental bodies have a total of 11 or a total of 26 months to acquire water company properties would have a considerable impact on the overall statutory scheme and would implicate a federal forum in a particularly difficult and delicate sphere of state regulation that could cause a "possible disruption of complex state administrative processes." *Zwickler* v. *Koota,* 389 U.S. 241, 249 n. 11 (1967); see also *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 814 (1976). The legislature has expressed a broad interest in the disposition of lands owned by public service companies. Major competing and conflicting considerations are involved. Notions of equity, comity and federalism require that a state and not a federal tribunal balance the relevant factors necessary to an interpretation of the statute which fulfills the intent of the legislature and avoids a constitutionally impermissible result. Cf. *Harris Commissioners Court* v. *Moore,* 420 U.S. 77, 83 (1975).

Finally, we perceive no undue hardship occasioned by abstention here. No sale of property is pending between a plaintiff and a governmental body which would be affected by the operation of the Option Statute. Ample time without prejudice exists for the plaintiffs to allow the state courts to construe the provisions of their own statute in a manner consistent with the federal constitution. We also recognize the probability that the legislature will act in the meantime to correct the manifest ambiguity in the statute.

III

The plaintiffs next allege that §§ 6(a), 6(b) and 12 of the 1975 PUCA Act, Conn. Gen. Stat. §§ 16-8(a), 16-8(b) and 16-32a, grant such sweeping powers for State regulation of public service companies that they destroy the rights of private management and constitute a virtual seizure

of the companies' business enterprises. Cf. *Pewee Coal Co.* v. *United States,* 88 F. Supp. 42 (Ct. Cl. 1950), aff'd, 341 U.S. 114 (1951). These provisions empower the PUCA (1) to summon and examine witnesses and to direct the production of documents needed in the performance of its duties or in connection with any hearing, § 16-8(a); (2) to conduct "management audits" to determine whether a company's operations are "inefficient, improvident, unreasonable, negligent or in abuse of discretion" and, if so, to order the affected company "to adopt such new or altered practices and procedures as the [PUCA] shall find to be necessary to promote efficient and adequate service to meet the public convenience and necessity, § 16-8(b); and (3) to impose a management practice of requiring competitive bidding in appropriate cases where the contract price exceeds $50,000, § 16-32a.

While it is true that many areas of company business should best remain within the jurisdiction of management, it must also be recognized that it is logical and permissible for the legislature to be concerned with management practices of public service companies which affect the public interest and welfare. Cf. *Midwestern Gas Transmission Co.* v. *Federal Comm'n,* 388 F.2d 444, 448 (7 Cir.), cert. denied, 392 U.S. 928 (1968). From its very inception in 1911, the Public Utilities Commission was intrusted with the duty to "keep fully informed as to the . . . manner of operation of all public service companies" and was authorized "to order . . . such changes in the manner of operation, as may be reasonably necessary for public safety . . . ." Public Acts of 1911, ch. 128. This section was later incorporated into the 1949 Revision of the General Statutes as § 16-11 and states in pertinent part as follows:

> The commission shall . . . keep fully informed as to the . . . manner of operation of all public service companies in respect to their adequacy and suitability to

> accomplish the duties imposed upon such companies by law and in respect to their relation to the safety of the public and of the employees of such companies. The commission may order such reasonable improvements . . . or such changes in the manner of operation, as may be reasonably necessary in the public interest.

We view the 1975 Amendments in question as nothing more than supplemental exercises of the PUCA's powers and duties existent in the Connecticut General Statutes with respect to the PUC for over 65 years. The obvious purpose of the new provisions is to establish additional procedures to insure a high quality of utility service for the general protection of the public, the ratepayers, and the stockholders' investments in the companies. These interests serve a real and legitimate State purpose, see, e.g., *Village of Belle Terre* v. *Boraas,* supra; *Sproles* v. *Binford,* supra; *Maher* v. *City of New Orleans,* supra. It seems to us to be quite reasonable that the PUCA be empowered to utilize its expertise to evaluate the efficiency of the companies' operations and, when necessary, to interpose regulatory directives in the public interest. Cf. *Midwestern Gas Transmission Co.* v. *Federal Power Comm'n,* supra at 448.

Contrary to the plaintiff's allegations, there is no unbridled control of the companies' internal affairs delegated to the PUCA by the legislation. The boundaries of the PUCA's permissible action are clearly marked by the enactments. With respect to § 16-8(b), the PUCA cannot commence proceedings against an affected company unless an audit reveals that the internal workings of the company are wasteful and inefficient, and, only after notice and a hearing, is the PUCA then authorized to issue an order requiring the company to adopt practices to remedy the mismanagement. Court review is available to the affected company under the Uniform Administrative Procedure Act, Conn.

Gen. Stat. § 4-183, to test the PUCA's adherence to the statutory standards, to determine the fairness of the administrative hearing, and to review the rationality of any order issued by the PUCA which requires any alteration of the company's internal affairs.

Similar considerations sustain the validity of § 16-32a. Before it can act, the PUCA must first determine by investigation whether competitive bidding of public service contracts in excess of $50,000 would be likely to reduce costs without impairing quality, continuity or dependability of service. If there is an affirmative finding, there must be notice and a hearing before the PUCA may promulgate regulations to govern procurement practices for the utility industry in this State. Each step of these administrative proceedings is subject to judicial review pursuant to the provisions of the Uniform Administrative Procedure Act.

We conclude, therefore, that these enactments are an authorized delegation of legislative power, that the standards prescribed are self-limiting and precise, and that basic due process rights are accorded by ready access to judicial review.[4] Cf. *Yakus* v. *United States,* 321 U.S. 414, 423-427 (1974).

IV

The plaintiffs, joined by the intervenor, also vigorously contest the constitutional validity of the 1972 Amendments to the Uniform System of Accounts. These Amendments significantly altered the accounting treatment to be accorded to gains and losses on the sale of land owned by water companies. To place the issues in perspective, it is necessary to review briefly the functions of the Uniform System of Accounts in the ratemaking process and the major elements of a utility's accounting methods.

The Uniform System of Accounts, first promulgated in 1922, essentially has a two-fold function. First, it requires a water company to follow a uniform accounting procedure

for the filing of annual reports to the PUCA under Conn. Gen. Stat. §§ 16-27 and 16-28. These yearly reports enable the PUCA to be informed of the financial condition of each company in the State, make comparisons among the companies, analyze the status of the entire industry within Connecticut, and issue appropriate regulatory decisions in the best interests of the companies, the shareholders and the public. Second, it provides for a financial overview of the company's business so that the PUCA has the necessary data for the regulation of utility service rates. When a company seeks a rate adjustment, its application to the PUCA must comply with the accounting format set forth in the Uniform System of Accounts to demonstrate the financial need for the rate increase. Obviously, therefore, the accounting system mandated by the Enactment plays an important role in the PUCA's decision-making process.

One basic exhibit that must be submitted in an application for a rate adjustment is an income statement which must reflect, among other things, the company's "operating income," i.e., the amount of operating revenues remaining after payment of operating expenses. Before 1972, the Uniform System of Accounts did not require the gains or losses from the sale of nondepreciable property to be reported as one of the items influencing the operating income of the utility. Rather, these gains or losses were credited or charged, as appropriate, to the "earned surplus" account, i.e., that portion of a company's earnings which legally can be paid out as dividends to stockholders or reinvested in additional property. Hence, gains or losses accrued directly to the benefit or detriment of the shareholders and did not affect the ratemaking process.

After the passage of the 1972 Amendments, gains or losses on the disposition of land could no longer be attributed to the earned surplus account, but instead had to be considered on the income statement as an "above the line" entry[5]. This new requirement affects the compu-

tation of the company's operating income which, in turn, influences the ratemaking process. For example, any gain realized on the sale of property could now be used to offset the amount of operating expenses, thereby reducing the total gross revenue needed to produce the allowed level of operating income. Thus, with less gross income required, lower rates could be charged to the utility's customers.

The question presented, therefore, is whether a gain on the sale of a company's nondepreciable asset should inure to shareholders as capital surplus, or to ratepayers as a reduction in the cost of service.

The plaintiffs and intervenor contend that a utility's shareholders have a vested right to gains from the appreciated market value of capital assets and that, as a consequence, any diversion of profits from the investors to the ratepayers arising from the sale of land constitutes a "taking" without just compensation. They point out that the investors and not the consumers have a legal and equitable interest in the company's property, cf. *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926), and, since the shareholders previously bore the risk of loss from the possible decline in the value of the utility's land, it is only fair and reasonable that the investors reap the benefit of a capital gain on the sale of that property. Cf. *Pennichuck Water Works* v. *State of New Hampshire,* 103 N.H. 49, 164 A. 2d 669 (1960).

The defendants, on the other hand, maintain that no justiciable case or controversy has been presented for our review and that any decision on the constitutional question framed by the plaintiff and intervenor would be premature. Cf. *Coffman* v. *Breeze Corporations,* 323 U.S. 316, 324 (1945). It is uncontroverted that as a general rule proceeds from land sales are received and retained by the company and may be used for dividend distribution or for reinvestment. It is only when the company seeks a rate adjustment that these proceeds are considered in deter-

mining the amount of revenues required from the ratepayers. Even in those cases where capital gains may be a factor in the ratemaking process, the PUCA has discretion either to treat the proceeds as above the line entries on the income statement in order to reduce rates paid by consumers, or to permit the funds to "flow through" the income statement to the earned surplus account without affecting the rate authorization. In either event, there is no abuse of discretion by PUCA unless the shareholders fail to receive a fair return on their investment. Cf. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942); *Bluefield Waterworks & Improvement Co.* v. *Public Service Comm'n*, 262 U.S. 679, 692-693 (1923). The present record presents no concrete set of facts which demonstrate that the passage of the 1972 Amendments has caused the shareholders to receive less than such fair return. Since we are without power to render advisory opinions or decide hypothetical questions, the defendants' argument is persuasive that we should decline "to decide [a] constitutional question in advance of the necessity for its decision." *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945).

Another contention of the defendants merits serious attention. The Johnson Act, 28 U.S.C. § 1342, provides as follows:

> The district courts shall not enjoin, suspend, or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

The plaintiffs and intervenor contend that, although the four conditions of the Act are met,[6] the Act is inapplicable for two reasons. First, it is asserted that the 1972 Amendments are regulations of a general nature and are not within the narrow confines of the statutory language of an "order affecting rates." Though the terms "order" and "regulation" may have significantly different meanings in the context of judicial review of administrative actions, there is no clear indication that Congress intended to use the denomination "order" in its more restrictive sense.

We believe the proscription of the Act reaches the issues at bar. One purpose of the Act was "to prevent forum-shopping by utilities between State and Federal courts, a practice that had bedeviled the administration of the rate structures of the various states." *Tennyson* v. *Gas Service Company*, 506 F.2d 1135, 1138 (10 Cir. 1974). Another was "to keep constitutional challenges to orders affecting rates out of the federal courts 'lock, stock and barrel,' or, as Professor Moore succintly puts it, to effect a 'general hands-off policy relative to state rate making.' " *Id.* These purposes are particularly served here because the validity of the 1972 Amendments is currently under consideration in two cases pending in the state courts. The provisions of the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 *et seq.*, more than adequately afford the plaintiffs and the intervenor protection from any possible infringement of their rights by the PUCA's appli-

cation of the 1972 Amendments to their rate applications. Federal judicial review is therefore inappropriate.

Second, it is urged that the Act is applicable solely to cases requesting injunctive relief and not to those seeking a declaratory judgment. We agree with the rationale expressed in the *Tennyson* case, supra, rejecting this identical claim. See also *Klotz* v. *Consolidated Edison Co. of New York,* 386 F. Supp. 577, 585 (S.D.N.Y. 1974). Cf. *Samuels* v. *Mackell,* 401 U.S. 66 (1971).

V

The plaintiffs' final federal claim focuses on the cumulative effect of the 1975 Amendments. It is argued that the overall impact of the legislation results in an unreasonable confiscation of their property and seriously impairs their rights under the Contract Clause of the Constitution, Art. I, § 10. Since we reach the merits of only two of the challenged provisions, the "overall impact" argument loses considerable force, and we find it unavailing.

We again emphasize that the plaintiffs, unlike other private corporations, are public purpose entities. They have been specially franchised by the State to supply communities with "an abundant supply of pure water for public and domestic use." (Stip. Ex. 12-18). Thus it seems clear that the State may impose reasonable land use controls upon them which may differ materially from those impressed upon other private property owners. The record reasonably supports the legislature's fear that any massive disposition of watershed properties would endanger the public health and welfare. The 1975 Amendments exhibit the legislature's comprehensive response to a potential evil which cannot be deemed to be constitutionally impermissible under the Fifth and Fourteenth Amendments. Cf. *Permian Basin Area Rate Cases,* 390 U.S. 747, 768-772 (1968); *Williamson* v. *Lee Optical Co.,* supra, 348 U.S. at 487-488.

We also conclude that, although the legislation restricts the plaintiffs' right to enter contracts for land sales, the guarantees of the Contract Clause have not been abrogated. One of the special benefits extended to public service companies is the grant of eminent domain power. Conn. Gen. Stat. § 25-42. It is of little consequence that the plaintiffs have utilized condemnation proceedings sparingly over the years; the ability of the companies to resort to condemnation undoubtedly was an effective tool in persuading private land owners to sell land. It therefore seems reasonable that the State, having delegated to public service companies a valuable part of its governmental prerogative to obtain land by eminent domain, should retain broad flexible authority to regulate and even delay any large abandonment of those companies' properties by open market sales. Economic, health and safety concerns justify the exercise of continuous and dominant police power by the State to safeguard against improvident management decisions of public service companies.

VI

Lastly, since we have disposed of all the federal constitutional claims on grounds previously stated, we dismiss the remaining pendent state claim set forth in Count VI of the complaint. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966); *McFaddin Express, Inc.* v. *Adley Corp.,* 346 F.2d 424, 427 (2 Cir. 1965), cert. denied, 382 U.S. 1026 (1966).

Accordingly, it is ORDERED:

1. That all causes of action alleged in the plaintiffs' and intervenor's complaints, except with respect to the so-called Option Statute, are dismissed;

2. That we abstain from a determination of the constitutional validity of the Option Statute to enable the

parties to institute proceedings in the courts of the State of Connecticut. Failure to seek relief in a state forum within 60 days will be ground for dismissal by this Court. *Government Employers* v. *Windsor,* 353 U.S. 364, 366 (1957); *Blout* v. *Mandel,* 400 F. Supp. 1190, 1202 (D. Md. 1975).

Dated at New Haven, Connecticut, this 29th day of December, 1977.

.....
J. Joseph Smith, U.S. Circuit Judge

.....
Robert C. Zampano, U.S. District Judge

.....
Jon O. Newman, U.S. District Judge

Footnotes

[1] Because this action was commenced before August 12, 1976, the applicability of 28 U.S.C. § 2281 is not affected by the repeal of that statute by Public Law No. 94-381, 90 Stat. 1119, August 12, 1976.

[2] The Act exempts developments of such land for utility and certain public recreational uses. Also, lands subject to the moratorium may be sold upon the written approval of the Council and the chief executive officer of the municipality in which the land is located.

[3] Non-point sources of pollution are polluting agents that do not arise from a particularly identifiable source or point. Examples include lawn and crop fertilizers and pesticides, road salt, and vehicle emissions. Point sources of pollution are sources that are more easily identifiable such as septic tanks, sewage fields, and industrial waste.

[4] We also reject plaintiffs' contention that Conn. Gen. Stat. § 16-22 unconstitutionally requires them to assume the burden of proof that a transfer of their property must be shown to be in the public interest. We consider the enactment to be a lawful exercise of the State's police power. Cf. *Southern Conn. Gas Co.* v. *Public Utilities Comm'n,* 158 Conn. 626 (1969).

[5] "Above the line" accounts represent events and transactions that constitute a portion of the ordinary utility operations and are accounted for as an element of utility operating income. "Below the line" accounts represent events and transactions which constitute all other business operations of the utility company and are accounted for, together with above the line income, as an element of net income from all operations.

[6] The moving papers indicate that: (1) jurisdiction is based solely on a claim that the 1972 Amendments are repugnant to the Federal Constitution; (2) no argument is made that the rates for intrastate sales of water interfere with interstate commerce; (3) the 1972 Amendments were enacted after due notice and a hearing; and (4) the state courts provide a speedy and efficient remedy for the causes advanced by the plaintiffs and intervenor; and indeed, had the parties concentrated their efforts on the litigation presently pending in the state courts, the issues at bar would probably have long been resolved in that forum.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIDGEPORT HYDRAULIC COMPANY, et al. vs. THE COUNCIL ON WATER COMPANY LANDS OF THE STATE OF CONNECTICUT, et al.	CIVIL NO. B-75-212

Judgment

This action having come on for Hearing on motions before a three-judge district court, Honorable J. Joseph Smith, United States Circuit Judge, Honorable Robert C. Zampano, United States District Judge, and Honorable Jon O. Newman, United States District Judge, and a Memorandum of Decision having been duly rendered and filed under date of December 29, 1977,

It is accordingly ORDERED, ADJUDGED and DECREED:

1. That all causes of action alleged in the plaintiffs' and intervenor's complaints are dismissed.

Dated this 19th day of June, 1978.

J. Joseph Smith, U.S. Circuit Judge

Robert C. Zampano, U.S. District Judge

Jon O. Newman, U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIDGEPORT HYDRAULIC COMPANY, et al, *Plaintiffs,* v. THE COUNCIL ON WATER COMPANY LANDS OF THE STATE OF CONNECTICUT, et al, *Defendants.*	CIVIL ACTION No. B-75-212

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Bridgeport Hydraulic Company, Litchfield Water Company and The Hydraulic Company, plaintiffs in the above captioned action, hereby appeal to the Supreme Court of the United States from that portion of the final order entered in this action on 19th day of June, 1978 which dismissed Counts I, II and IV of their complaint.

July 17, 1978

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APPENDIX C — STATUTES INVOLVED

PUBLIC ACT NO. 77-606

An Act concerning the council on water company lands.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1.

The general assembly finds and declares that an adequate supply of pure water is and will always be essential for the health and safety and economic well-being of the state, that lands acquired for public water supply purposes are and will in the future be necessary to protect the public water supply notwithstanding the availability of water filtration plants; that some of such lands have been acquired by water companies having the power of eminent domain, that such lands are in imminent danger of being disposed of by water companies for residential and commercial development, that such lands constitute a significant portion of the remaining undeveloped and open space lands in close proximity to the urbanized areas of the state, and that it is in the public interest that there be established criteria for the orderly disposition of such lands. The general assembly further finds and declares that in order to protect the purity and adequacy of the water supply the department of health should be directed to revise its procedure for the review of applications to sell water company land located on public drinking water supply watersheds, that the disposition of such land prior to the revision of application review procedures would jeopardize the public health and welfare, and that therefore the prohibition against sale or development of water company land located on the watershed should be extended for a period of two years from the effective date of this act.

Section 2.

As used in this act, "critical components of a stream belt" means (1) the water course of a defined stream in-

cluding banks, beds and water; (2) land subject to stream overflow; (3) associated wetlands, and (4) shorelines of lakes and ponds associated with the stream. "First-order stream" means a stream which directly enters a reservoir; "purity and adequacy of public drinking water supply" means the quality and quantity of public drinking water as determined by the public health council under subsection (d) of section 25-32 of the general statutes; "water company" means any water company as defined in section 25-32a of the general statutes, and "commissioner" means the commissioner of health.

Section 3.

The department of health shall adopt, in accordance with chapter 54 of the general statutes, regulations establishing criteria and performance standards for three classes of water company owned land.

(a) Class I land includes all land owned by a water company which is either: (1) Within two hundred and fifty feet of high water of a reservoir or one hundred feet of all watercourses as defined in agency regulations adopted pursuant to section 19-13 of the general statutes; (2) within the areas along watercourses which are covered by any of the critical components of a stream belt; (3) land with slopes fifteen per cent or greater without significant interception by wetlands, swales and natural depressions between the slopes and the watercourses; (4) within two hundred feet of groundwater wells; (5) an identified direct recharge area or outcrop of aquifier now in use or available for future use, or (6) an area with shallow depth to bedrock, twenty inches or less, or poorly drained or very poorly drained soils as defined by the United States Soil Conservation Service that are contiguous to land described in subdivisions (3) or (4) of this subsection and that extend to the top of the slope above the receiving watercourse.

(b) Class II land includes all land owned by a water company which is either (1) on a public drinking supply watershed which is not included in Class I or (2) completely off a public drinking supply watershed and which is within one hundred and fifty feet of a distribution reservoir or a first-order stream tributary to a distribution reservoir.

(c) Class III land includes all land owned by a water company which is unimproved land off public drinking supply watersheds and beyond one hundred and fifty feet from a distribution reservoir or first-order stream tributary to a distribution reservoir.

Section 4.

Section 25-32 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) The state department of health shall have jurisdiction over all matters concerning the purity and adequacy of any source of water or ice supply used by any municipality, public institution or water or ice company for obtaining water or ice, the safety of any distributing plant and system for public health purposes, the adequacy of methods used to assure water purity, and such other matters relating to the construction and operation of such distributing plant and system as may affect public health. The qualifications of the operators of plants for the treatment of water furnished or intended to be furnished to any such water supply shall be subject to the approval of said department.

(b) No water company shall sell, lease, assign or otherwise dispose of or change the use of any watershed lands, except as provided in section 25-43c, without a written permit from the state commissioner of health. Said commissioner shall not grant a permit for the sale, lease or assignment of Class I land, and shall not grant a permit for a change in use of Class I land unless the applicant

demonstrates that such change will not have a significant adverse impact upon the present and future purity and adequacy of the public drinking water supply.

(c) The commissioner of health may grant a permit for the sale, lease, assignment or change in use of any land in class II subject to any conditions or restrictions in use which the commissioner may deem necessary to maintain the purity and adequacy of the public drinking water supply, giving due consideration to: (1) the creation of point or non-point sources of contamination; (2) the disturbance of ground vegetation; (3) the creation of subsurface sewage disposal systems; (4) the degree of water treatment provided, and (5) any other significant potential source of contamination of the public drinking water supply.

(d) The commissioner shall not grant a permit for the sale, lease, assignment or change in use of any land in class II unless the applicant demonstrates that the proposed sale, lease, assignment or change in use will not have a significant adverse impact upon the purity and adequacy of the public drinking water supply and that any use restrictions which the commissioner requires as a condition of granting a permit can be enforced against subsequent owners, lessees and assignees.

(e) The term "source of water or ice supply" includes all springs, streams, watercourses, brooks, rivers, lakes, ponds, wells or underground waters from which water or ice is taken, and all springs, streams, watercourses, brooks, rivers, lakes, ponds, wells or underground waters tributary thereto and all lands drained thereby; and the term "watershed land" means land from which water drains into a public drinking water supply.

(f) The public health council shall adopt and from time to time may amend the following: (1) Physical, chemical, radiological and microbiological standards for the quality of public drinking water; (2) minimum treatment methods,

taking into account the costs thereof, required for all sources of drinking water, including guidelines for the design and operation of treatment works and water sources, which guidelines shall serve as the basis for approval of local water supply plans by the commissioner of health, and (3) minimum standards to assure the long-term purity and adequacy of the public drinking water supply to all residents of this state. On or after October 1, 1975, any water company which requests approval of any drinking water source shall provide for such treatment methods as specified by the public health council, provided any water company in operation prior to October 1, 1975, and having such source shall comply with regulations adopted by the public health council in conformance with The Safe Drinking Water Act, Public Law 93-523,[1] and shall submit on or before February 1, 1976, a statement of intent to provide for treatment methods as specified by said council, to the commissioner of health for his approval.

(g) The department of health may perform the collection and testing of water samples required by regulations adopted pursuant to this section when requested to do so by the water company. The department shall collect a fee equal to the cost of such collection and testing. Water companies serving one thousand or more persons shall not request routine bacteriological or physical tests.

Section 5.

Within two years after the effective date of this act, the commissioner shall adopt regulations in accordance with chapter 54 of the general statutes for the review of permit applications. Such procedure shall include a standard application form, a public hearing and enforcement provisions. If, in the judgment of the commissioner, the proposed sale, lease, assignment or change in use of Class II land may have a significant adverse impact upon the applicant's water supply, said commissioner shall, within

thirty days of his receipt of a complete permit application, refer such application to a professional review team appointed by said commissioner, consisting of a professional water supply engineer from the staff of the public utilities control authority; a professional from the staff of the department of environmental protection with expertise in one of the following areas: Water supply, hydrology, aquatic biology, forestry, geology or other related fields; a professional planner recommended by the chief executive officer of the town or towns in which the land proposed for disposition is located; a professional planner from the staff of the department of planning and energy policy; an appointee from the staff of the department of health and up to three other experts in the public health field. No appointee shall serve at the time of his appointment in the employ of the applicant. Such team shall evaluate the impact of the proposed sale, lease, assignment or change in use of land upon the purity and adequacy of the water supply under the most severe climatic conditions and its ability to meet current drinking water standards adopted by the department of health.

Section 6.

Within sixty days after the receipt of a complete permit application the commissioner of health shall issue a written decision granting or denying the permit and setting forth the reasons for his decision, provided, if the commissioner has utilized the services of a professional review team as provided for by section 5 of this act, such review team shall submit to said commissioner, within ninety days of his receipt of such application, a written report of its findings, and said commissioner shall issue his decision within one hundred and twenty days of his receipt of such application. The commissioner shall forward a copy of his decision to the applicant, the public utilities control authority, the department of environmental protection and the chief executive officer of the town in which the land is located.

Section 7.

The commissioner of health shall submit a report to the general assembly on or before December 1, 1980, evaluating the application and review procedures and the land classification system established pursuant to this act and recommending such amendments to this act as said commissioner deems necessary to better effectuate the purposes of this act.

Section 8.

No water company land classified under section 3 of this act as class II land shall be sold, leased or assigned for a period of two years from the effective date of this act, or until the final adoption of regulations by the commissioner of health as required in section 5 of this act, whichever occurs first.

* * * * *

Section 10.

This act shall take effect from its passage. Approved June 26, 1977.

§ 16-22. Rates; transfer of assets or franchise; burden of proof

At any hearing involving a rate or the transfer of ownership of assets or a franchise of a public service company, the burden of proving that said rate under consideration is just and reasonable or that said transfer of assets or franchise is in the public interest shall be on the public service company.

PUBLIC ACT NO. 75-405

An Act concerning the sale of water company lands.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1.

There is established a council on water company lands which shall be composed of the commissioner of environmental protection or his designee, the commissioner of health or his designee, the chairman of the public utilities commission or his designee, the director of planning, planning and budget division, department of finance and control or his designee, all of whom shall be ex-officio members with the power to vote and three representatives of the general public to be appointed by the governor of whom one member appointed by the governor shall be upon written recommendation of the south central regional planning agency and one member appointed by the governor shall be upon written recommendation of the greater Bridgeport regional planning agency. The council shall elect a chairman from among its members appointed by the governor and shall adopt such rules of procedure as are necessary to carry out its functions. Members of the council shall not be compensated for actual expenses. The departments of environmental protection, finance and control and health and the public utilities commission shall cooperate with the council and shall furnish such information, personnel and assistance as may be necessary to carry out the council's duties pursuant to section 2 of this act. Any such services or assistance required by the council shall be provided by said departments and shall be charged to the appropriations available to those agencies.

Section 2.

(a) Notwithstanding any other provision of the general statutes, no water company, as defined in section 16-1 of the general statutes and having the power of eminent domain, shall sell or otherwise transfer to other than a municipal or state agency any unimproved real property or any interest or right therein in excess of three acres or develop such property, for any use not directly related to a public

service function other than for public recreational use as governed by section 25-43c of the general statutes for a period of two years from the effective date of this act without the written approval of the council and the chief executive officer of the municipality in which the land is located.

(b) During the first year of said two year period each water company shall file (1) with the council an inventory with such form and content as are prescribed by the council of all unimproved real property owned by such company and (2) with each municipality an inventory of all unimproved real property owned by such company within the boundaries of the municipality.

(c) The council shall do the following and report its interim findings and legislative recommendations to the general assembly on or before February 15, 1976, and present its final report to the general assembly on or before February 15, 1977:

(1) Develop criteria for determining which, if any, water company lands may be surplus with regard to the purity and adequacy of both present and future water supply and which, of any lands determined to be surplus may be desirable for specified modes of recreation or open space use and which may be suitable for other uses,

(2) develop policies and procedures to assist municipalities in acquiring such lands,

(3) study and make recommendations for executive and legislative action for a state policy regarding the disposition of water company lands,

(4) study the legal questions relating to the price at which surplus land might be sold, including the legal basis for municipal and state purchase of water utility land at a price based on the initial purchase cost to the utility, and the legal basis for water utilities to sell land purchased under the power of eminent domain for profit.

(5) study the requirements of the Federal Safe Drinking Water Act, P.L. 93-523 and of state laws for filtration plant construction.

(6) develop provisions for the long term acquisition of surplus water company land over a period of fifteen to twenty years by the state or towns, and for restriction of the per cent of land within a given town which a water company may sell in a specified period without town approval.

* * * * *

Section 5.

This act shall take effect from its passage except that this act shall not apply to applications for sales of land submitted under provisions of sections 16-43, 16-50c and 25-32 of the general statutes which were submitted prior to the date of enactment of this act and which are pending at the time of the enactment of the act.

Approved June 25, 1975.

APPENDIX D — § 16-43

§ 16-43. Merger or sale of public service companies. Issuance and approval of securities

No public service company, without having first obtained the approval of the commission, shall

(1) directly or indirectly merge, consolidate or make common stock with any other company or sell, lease, assign, mortgage, except by supplemental indenture in accord with the terms of a mortgage outstanding May 29, 1935, or otherwise dispose of any essential part of its franchise, plant equipment or other property necessary or useful in the performance of its duty to the public, provided the commission shall not approve the sale of watershed or water supply lands by water companies without the prior approval of the state commissioner of health as provided in section 25-32;

* * * * *

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-439

BRIDGEPORT HYDRAULIC COMPANY, et al.,
Appellants,

v.

THE COUNCIL ON WATER COMPANY LANDS
OF THE STATE OF CONNECTICUT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO AFFIRM AND REPLY TO JURISDICTIONAL STATEMENT

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IN THE

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BRIDGEPORT HYDRAULIC COMPANY, et al.,
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THE COUNCIL ON WATER COMPANY LANDS OF THE STATE OF CONNECTICUT, et al.,
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MOTION TO AFFIRM AND REPLY TO JURISDICTIONAL STATEMENT

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the three-judge court for the District Court for the District of Connecticut is reported at 11 E.R.C. 1545. The appellants have attached to their jurisdictional statement copies of the Opinion, the Judgment and the Notice of Appeal as their Appendix B. All citations to that

Opinion in this Motion to Affirm and Reply to Jurisdictional Statement will refer to the appropriate pages of Appendix B of the jurisdictional statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the jurisdictional statement.

QUESTIONS PRESENTED

This Motion to Affirm and Reply to Jurisdictional Statement will respond to the questions presented as stated in the jurisdictional statement.

STATUTES INVOLVED

The statutes involved are adequately set forth in the jurisdictional statement. All citations to the respective statutes involved will refer to the pages of Appendix C where those statutes have been printed in the jurisdictional statement.

STATEMENT

This is a direct appeal from the final judgment and decree entered on June 19, 1978, by a District Court of three judges specially constituted pursuant to 28 U.S.C. 2281 and 2284, dismissing all causes of action alleged in the plaintiffs' and intervenor's complaints.

The appellants have appealed from that part of the judgment which dismissed Counts I and II of their five-count complaint, in which they sought declaratory and injunctive relief pursuant to 42 U.S.C. 1983 by way of an injunction restraining enforcement of state statutes on grounds of unconstitutionality. As more fully appears in the Memorandum of Decision reprinted in Appendix B of the appellants' jurisdictional statement, several other statutes and regulations comprising parts of the state's regulatory scheme for privately owned water utilities were also attacked in the complaint.

The complaint was filed on July 2, 1975. Thereafter a three-judge District Court was convened under 28 U.S.C. 2281 and 2284. Following completion of the testimony and the assembling of a large number of exhibits, briefs and reply briefs were filed on October 1, 1976, and the case was argued on October 19, 1976.[1] The Memorandum of Decision was dated December 29, 1977. Subsequently, the parties having complied with the order of the Court, a final judgment was entered on June 19, 1978. Public Act 77-606, amending Sec. 25-32, was adopted by the state legislature after the date of argument and before the date of the Memorandum of Decision. The statute was brought to the attention of the District Court without added briefing or argument by the parties. The reservations expressed by the District Court in part II of its Memorandum of Decision were met by the adoption of other statutes in the 1978 session of the state legislature and are not germane to this appeal.

In the jurisdictional statement the appellants have reasserted part of their original claims that the state's regulatory scheme for water utilities is unconstitutional as to them. The scope of the questions presented has been limited to the statutes involved, Sec. 16-22 and Sec. 25-32, as amended, of the Connecticut General Statutes. Appellants' argument as to Sec. 16-22 has required reprinting in Appendix I of excerpts from the Regulations of Connecticut State Agencies which were presented to the District Court in order to clarify the state's practices in implementing this statute.

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[1]The memorandum of decision referred to this record as "expansive." Jurisdictional statement, p. 6a.

ARGUMENT

The decision of the three-judge District Court is correct and should be affirmed. The arguments suggested by the jurisdictional statement do not support the conclusion that the issues involved are substantial or that the District Court was in error.

A.

Adoption of the Amendments to Sec. 25-32, Connecticut General Statutes was a Constitutional Exercise of the State's Police Powers.

As to Sec. 25-32, as amended by P.A. 77-606, the appellants have claimed in their jurisdictional statement unequal application of laws and regulations designed to protect the health and welfare of the public, which has resulted in their having suffered a *de facto* taking of their property.[2]

In the course of implementing the Federal Safe Drinking Water Act (P.L. 93-523) at the state level, the Connecticut State General Assembly in 1975 and 1977 adopted statutes providing for the development of legislation, departmental regulations, and procedures for the use of eminent domain powers to protect and preserve the purity and adequacy of the public water supplies furnished by private water utilities.[3] The District Court took note of the purpose of the 1975 statute to study and develop more explicit and more restrictive state statutes to control the use and disposition of watershed and off watershed land.[4] The District Court's reading of the 1975 and 1977 statutes confirmed that both the state legislature and the Council on Water Company Lands it had created to study and develop recommendations for public action for this purpose, had acted diligently to implement the federal policies on safe drinking water.[5]

[2]Jurisdictional statement, p. 2, Questions Presented, "A."

[3]Jurisdictional statement, pp. 32a-35a (Public Act No. 75-405, adopted 1975) and p. 26a-32a (Public Act No. 77-606, adopted 1977).

[4]Jurisdictional statement, p. 3a-4a.

The practical results of Public Act 77-606 of which appellants now complain are (1) that the classifications established under this statute could force them to retain certain lands for water supply protection and (2) that such classifications are not applied to any other class of land owners.

By attacking the classification of water supply lands and Sec. 25-32, the appellants have undermined their own major premise. The District Court noted in its Memorandum of Decision that,

> ". . . (T)he plaintiffs submit that no health hazards will be created by their contemplated sales because they rest assured that their water treatment facilities more than adequately protect the public and that any sale of property must pass muster before the Department of Health under other statutes and regulations. See, e.g., Conn. Gen. Stat. § 25-32(b)."[6]

The District Court found evidence of a substantial public controversy over the effectiveness of existing water treatment facilities and the adequacy of current state health department guidelines to determine the size of the watershed needed to produce an adequate supply of pure water for the consumers served by the appellants. It then said,

> "The extensive testimony of experts and documentary evidence presented to this Court clearly demonstrate

[5]Jurisdictional statement, Appendix C, p. 26a, reprinting Sec. 1 of Public Act No. 77-606.

[6]Jurisdictional statement, Appendix B, p. 6a. This is still the appellants' claim. See Jurisdictional statement., p. 8.

that innumerable factors must be considered and weighed in order to resolve the dispute concerning the feasibility of the sales of water company lands. The place for a definite determination of the controversy is the legislature and not the judiciary."[7]

For the reasons spelled out in the legislative's express findings, three categories were established by the state legislature for administration of the Health Commissioner's discretion in authorizing sales of water company lands under Sec. 25-32.[8]

The categories are based on three degrees of proximity to a public drinking water supply or reservoir. In all of the classes created, however, the state legislature provided explicit conditions and criteria under which the state health commissioner was authorized to grant a permit for a change in land use.[9] In the most extreme case, Class I land, the permit would not be granted "unless the applicant demonstrates that such change will not have a significant adverse impact upon the present and future purity and adequacy of the public drinking water supply."[10] For the class of land given less protection as a source of public drinking water (Class II), a broader discretion was allowed to the Health Commissioner; and the empowering language was made more permissive.[11] The remaining category, Class III land, does not require a permit.[12]

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[7]Id., Appendix B, pp. 6a-7a.

[8]Id., Appendix C, pp. 27a-28a, Sec. 3 of Public Act No. 77-606.

[9]Jurisdictional statement, p. 28a, Appendix C, Sec. 4(b), (c), (d) and (e) of Public Act No. 77-606.

[10]Id., subsection (b).

[11]Id., subsections (c) and (d).

[12]Jurisdictional statement, Appendix C, pp. 28a-29a, compare Sec. 3(c) and Sec. 3(b) and (c).

A reading of Public Act No. 77-606 in Appendix C of appellants' jurisdictional statement (pp. 26a-32a) thus reveals that appellants' summary of its provisions is inaccurate and the "*de facto* taking" they claim is not consistent with the facts.[13] There is no arbitrary, permanent prohibition against sales of any of the three categories of water company land. Instead a detailed statutory procedure has been adopted to guide the filing and the approval of applications within previously described criteria.[14]

The so called "moratorium" is simply a stay for not more than two years pending the adoption of implementing regulations, unless the regulations are adopted before that date. At the time this is filed less than eight months remain of that period; and the rulemaking process is currently underway.[15]

There is no offer or finding in this case that there exists in fact any particular proposed sale or other transaction to dispose of water company land in any of the three classes. To the extent that this was the evidence before the District Court, the constitutional issue was decided in terms of appellants' "contemplated sales."[16] No such hypothetical sales would occur until after substantial future plant construction, including new filtration facilities in the future.[17] The appellees contend, as before, that no case or controversy is here presented for decision by the Court on appeal.

As appellees argued in their brief to the District Court, the appellants are in possession of their property at all times, regardless of whether or not its disposition is made condi-

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[13]Jurisdictional statement, pp. 3-4, "Statement."

[14]Jurisdictional statement, Appendix C, pp. 30a-32a, Sec. 5 and 6 of Public Act No. 77-606.

[15]Id., p. 32a, Sec. 8 of Public Act No. 77-606.

[16]Jurisdictional statement, Appendix B, p. 6a.

[17]Id., p. 4a.

tional on statutory requirements for the protection of public drinking water supplies or for any other regulatory purpose. Any removal of the land from the appellants' public utility rate base as surplus for any reason is entirely the unilateral discretionary act of the appellants, which the state regulatory agencies do not consider or control until appellants apply to sell, lease or assign the land.[18]

The appellees contend that requiring the water utility companies to use watershed land for the provision of water utility service to the public is not an unconstitutional deprivation of all reasonable uses of that land. The appellants' land in such a case is used for exactly the purpose for which it was acquired. From this it follows that appellants are at all times entitled to enjoy a return on the use of the subject land as part of their utility plant under Public Act 77-606.[19] Consequently, the appellants could not demonstrate any taking of their land or of any rights in the land.

The District Court held this legislation to be a permissible exercise of the police power to protect the purity and adequacy of the public drinking water supply which bears a real and substantial relation to a legitimate state purpose.[20] While the limitation on the sale, lease or other disposition of water company lands may affect the appellants' opportunities to reap immediate net profits, said the Court, that fact alone does not give rise to any constitutional infirmity.[21]

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[18]Jurisdictional statement, Appendix C, pp. 26a-32a, (Sec. 25-32, as to protection of public drinking water supply) and p. 36a (Sec. 16-43, as to public utility regulations).

[19]*Bridgeport Hydraulic Co.* v. *Rempsen*, 124 Conn. 437, 442-443 (1938). *See Public Utility District No.* 1 v. *City of Seattle*, 382 F.2d 666 (1967). Compare jurisdictional statement, pp. 17a-18a.

[20]*Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974).

[21]*Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 424 (1952).

The second claim of appellants concerning the amendments to Sec. 25-32 in Public Act 77-606 is that no class of landowners other than water companies is so regulated and that the appellants are being treated differently from others who are similarly situated. The short answer of the District Court was that public utility water companies are different from any other class of landowners.

> "We again emphasize that the plaintiffs [appellants], unlike other private corporations, are public purpose entities. They have been specially franchised by the State to supply communities with an 'abundant supply of pure water for public and domestic use.' (Stip. Ex. 12-18) Thus it seems clear that the State may impose reasonable land use controls upon them which may differ materially from those impressed upon other private property owners. The record reasonably supports the legislature's fear that any massive disposition of watershed properties would endanger the public health and welfare. The 1975 Amendments exhibit the legislature's comprehensive response to a potential evil which cannot be deemed to be constitutionally impermissible under the Fifth and Fourteenth Amendments. Cf. *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-772 (1968); *Williamson* v. *Lee Optical Co.*, supra, 348 U.S. at 487-488."[22]

The equal protection clause has generally been held to mean that the rights of all persons must rest upon the same rule under similar circumstances applying to the exercise of all the powers of the state which can affect the individual or his property.[23]

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[22]Jurisdictional statement, Appendix B, Memorandum of Decision at p. 20a. *Williamson* v. *Lee Optical Co.*, was cited by District Court Memorandum of Decision at p. 7a as 348 U.S. 483, 487-488 (1955).

[23]*Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 37 (1927).

In statutes protecting the public health and welfare the legislative powers of classification are broad; and the Supreme Court has repeatedly sustained expressions of state legislative discretion based on minor differences in status between classes regulated and classes excluded from regulation.[24] As the Supreme Court commented at a later date,

> "Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it."[25]

The opinion of the District Court rejected the appellants' claim that the classification of their property was an invidious deprivation of equal protection. The District Court found the circumstances of the lands' acquisition, the public obligations assumed under the charters given to the water companies, and the importance of the purity and adequacy of the public water supply all support the particular application of Sec. 25-32 to the disposition of water company lands located within and adjacent to watersheds and reservoirs. For these reasons the appellants' reliance on authorities based on the treatment of persons similarly circumstanced is unsupported by the facts found by the District Court.[26]

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[24]Cases collected in footnote 1 of dissent by Mr. Justice Brandeis in *Louisville Gas & Electric Co.* v. *Coleman*, Id., at pp. 42-43.

[25]*Madden* v. *Commonwealth of Kentucky, et al.*, 309 U.S. 83, 88 (1940), citing with approval the dissenting opinion of Mr. Justice Brandeis in *Louisville Gas & Electric Co.* v. *Coleman*, supra.

[26]Jurisdictional statement, p. 7.

B.

The Amendment Expanding the Effect of Sec. 16-22, Connecticut General Statutes was a Constitutional Exercise of the State's Police Powers.

Sec. 16-22 extended to the transfer of ownership of the assets or franchise of a public service company the same rule that had long been in effect as to the burden of proof in administrative hearings involving utility rates.[27] The District Court rejected appellants' contention that this statute unconstitutionally requires them to assume the burden of proof that a transfer of their property must be shown to be in the public interest. The District Court said, "We consider the enactment to be a lawful exercise of the State's police power."[28] Constitutionality of Sec. 16-22 must be considered in terms of the statute whose implementation it controls, Sec. 16-43.[29] The Public Utilities Control Authority is governed in the administration of Sec. 16-43(1) by the regulations its predecessor state agency adopted, Sec. 16-43-1 and 16-1-61, Regulations of Connecticut State Agencies.[30]

The administering state agency has provided by regulations that have the force of state statutes for the submission of substantial information about each proposed sale under Sec. 16-43(1).[31] The burden of proving the applicant's case

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[27]Jurisdictional statement, p. 3, Questions Presented, "B." Sec. 16-22 is reprinted in Appendix C at p. 32a of jurisdictional statement.

[28]Jurisdictional statement, Appendix B, supra, p. 23a, footnote 4.

[29]Jurisdictional statement, Appendix D, p. 36a. Appellants have reprinted subsection (1) of Sec. 16-43, which is the only portion that applies to the alienation of interests in water company lands.

[30]Sec. 16-43-1, 16-1-46, and 16-1-61, Regulations of Connecticut State Agencies were reprinted as Appendix I of this brief. These were part of Exhibit 10 before the District Court. See Record on Appeal, Document No. 56.

[31]*Bailey* v. *Bruneau's Truck Service, Inc.*, 149 Conn. 46, 54 (1961); *Hyde* v. *Connecticut Co.*, 122 Conn. 236, 240 (1936).

under Sec. 16-22 is identical to the apportionment of the burden of proof generally followed by the Supreme Court of the State of Connecticut.[32] The legislature simply codified the state common law as to the burden of proof before administrative tribunals by amending Sec. 16-22 to extend it coverage to utility land sales.[33] The water companies and all other utilities applying under Sec. 16-43(1) would in all events have the burden to prove the essential facts necessary to demonstrate their compliance with the provisions of that statute.[34] Obviously an applicant could not rely on the PUCA or on any opponent to prove its case under such an application.[35] The applicant's burden is to prove the truth of the propositions set forth in its application under Sec. 16-43(1).[36]

As water companies, the appellants are part of a class that includes gas, electric, telephone, cable antenna television, and sewage companies, all of which are public service companies.[37] All members of appellants' class are privately owned and operated for the purpose of making a profit. So the appellants and others in their class are all being treated alike; and as public service companies the appellants and their class are different from all other land-owning individuals and corporations organized for profit.

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[32]*Nikitiuk* v. *Pishtey*, 153 Conn. 545, 552 (1966).

[33]*Lyons* v. *Fox New England Theatres, Inc.*, 112 Conn. 691, 692 (1931); *Conley* v. *Board of Education*, 143 Conn. 488, 496 (1956). Sec. 16-22 is consistent with federal precedents applicable to similar issues.

[34]*South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (1970).

[35]*U.S. Fire Ins. Co.* v. *China Union Lines, Ltd.*, 375 F. Supp. 652, aff'd. 496 F.2d 1198 (1974).

[36]*Lodge 743, International Association of Machinists, AFL-CIO* v. *United Aircraft Corp.*, 299 F. Supp. 877 (1969) (Conn., D.C.); *Chambers* v. *Blickle Ford Sales, Inc.*, 313 F.2d 252 (1963) (Conn. C.A.)

[37]Sec. 16-1, Connecticut General Statutes.

The public service companies, including the appellants, are unique in that they were specially granted the franchises by which they provide a public service in behalf of the state.[38] So the public service companies have been given powers commonly held only by the state on the one hand and are subject to a high degree of regulation and control by the state on the other.[39] Also, appellants' property is uniquely and specially protected by law at a level that exceeds the realty of any other class of private property owners. Finally, the grant of public service franchise rights is open-ended and may be altered, amended, or repealed at the pleasure of the legislature.

The contents of the application under Sec. 16-43(1), as defined by the procedural regulations reprinted in Appendix I, set forth the scope of the facts the PUCA considers in the process of permitting transfer of property interests in utility plants. Both the purity and the adequacy of the water supply are encompassed by the elements of the application, as it may appertain to water company lands located in areas vulnerable to pollution. The application is explicitly required to represent whether the real property is necessary or useful in the performance of the duty of the public service company to the public.[40] This includes all possible aspects of supply and watershed protection, supporting the objects of Sec. 25-32. The components of the application routinely require a concise and explicit statement of the facts on which the PUCA is expected to rely in granting the authorization of the proposed transaction, including the public convenience and necessity thereof.[41] In addition the special components of the applica-

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[38]Jurisdictional statement, Appendix B, Memorandum of Decision, pp. 2a-3a, 20a.

[39]Jurisdictional statement, Appendix B, Memorandum of Decision, pp. 13a-15a.

[40]Appendix I, Sec. 16-43-1(b), Regulations of Connecticut State Agencies.

[41]Appendix I, Sec. 16-1-46(a)(3), Regulations of Connecticut State Agencies.

tion include a copy of the agreement to sell, lease or assign the real property.[42]

The grant in the appellants' charters is for the purpose of supplying to the respective franchise areas "an abundant supply of pure water for public and domestic use."[43] This purpose is implemented by Sec. 16-22 and 16-43(1), and by the above-referenced procedural regulations to achieve that purpose, which expresses the public interest mentioned in Sec. 16-22. The requirement for approval and careful consideration of the interests of stockholders and customers was established to prevent the wasting of the appellants' real estate and other property by collusive sales for less than fair market value that may deprive the respective water companies of plant facilities necessary to provide utility service to the public in accordance with their legislative charters. This is the necessary and sufficient connection between the evil addressed by Sec. 16-22 and the remedy adopted, which supplies the nexus required by constitutional due process.[44] For these reasons Sec. 16-22 is reasonable and bears a rational relation to the state's regulatory policy.[45]

C.

The Decision in Penn Central Transportation Company v. City of New York Supports Appellees' Motion to Affirm.

In their Jurisdictional statement the appellants discussed *Penn Central Transportation Company* v. *City of New York* as an authority in support of the proposition that the questions

[42]Appendix I, Sec. 16-1-61(b), Regulations of Connecticut State Agencies.
[43]Jurisdictional statement, Appendix B, Memorandum of Decision, p. 20a.
[44]*California Bankers Association* v. *Shultz*, 416 U.S. 21 (1974).
[45]*General Telephone Co. of Southwest* v. *U.S.*, 449 F.2d 846 (1971).

appellants seek to place before the United States Supreme Court are substantial.[46] Appellants' case was decided by the Supreme Court on issues related to preservation of historic or aesthetic interest, while the instant case turns substantially on the preservation of an adequate supply of pure water. Several of the points in the Court's rationale support the affirmation of the District Court's judgment against the appellants.

The Supreme Court affirmed the decision of the Court of Appeals of New York, which had upheld the New York City Landmarks Preservation Law, which was challenged as a taking in violation of the Fifth and Fourteenth Amendments. The Supreme Court said that in instances in which a state tribunal reasonably concluded that "the health, safety, morals or general welfare" would be promoted by prohibiting particular contemplated uses of land, the Supreme Court has upheld land use regulations that destroyed or adversely affected recognized real property interests.[47] In one example the Supreme Court said the state might properly make a choice between the preservation of one class of property and that of the other. It then said that the state had not exceeded its constitutional powers by deciding upon the destruction of one class of property without compensation in order to save another which, in the judgment of the legislature, is of greater value to the public.[48]

In a reference that parallels the appellants' complaint that they are unable to capitalize on the rise in market value of their watershed and buffer zone land by reason of the statutes protecting public health, the Supreme Court said

[46]_____ U.S. _____, 98 S. Ct. 2646 (1978). For appellants' references see jurisdictional statement, pp. 5, et seq.
[47]*Penn Central Transportation Company* v. *City of New York*, 98 S. Ct. at 2260.
[48]*Id.*, referring to *Miller* v. *Schoene*, 276 U.S. 272 (1928).

> ". . . (T)he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[49]

At a later point the Supreme Court said,

> "It is of course true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others."[50]

Again referring to facts that parallel the instant case, the Supreme Court later pointed out that,

> ". . . (T)he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has for the past 65 years . . . So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but to obtain a 'reasonable return' on its investment."[51]

The appellants stipulated in the instant case that The Bridgeport Hydraulic Company owns approximately 18,062 acres of land, of which it proposes to dispose of approximately 13,459 acres. 9,366 acres of the land that party wishes to

[49] *Id.*, 98 S.Ct. 2662-2663.

[50] *Id.*, 98 S. Ct. 2664.

[51] *Id.*, 98 S. Ct. 2666.

sell are currently used and useful in providing water utility service to the public within its franchise area.[52] The appellants also stipulated that the intervenor, The New Haven Water Company, owns approximately 23,213 acres of land, of which it proposes to dispose of 15,903 acres. 14,225 acres of the land that intervenor wishes to sell are currently used and useful in providing water utility service.[53]

The location and character of the land the appellants propose to dispose of were described to the District Court in detailed exhibits that are a part of the record in this case.[54] In summing up the object of the legislation the appellants contend is unconstitutional the District Court said,

> "By providing that there can be no massive divestitures of watershed and off-watershed lands the State is insuring the ability of the water companies to provide pure water to their customers."[55]

It does not appear that the Supreme Court's recent decision on the New York City Landmarks Law provides a basis on which to conclude that the questions appellants have submitted are substantial. On the contrary, the reasons for this decision are entirely consistent with the reasoning of the District Court in the instant case. The primary distinction is that the health hazards presented by the appellants' contemplated divestiture programs are more acute and threaten

[52] See the Record on Appeal, Stipulation 152c. This will be found in Document 54.

[53] *Id.*, Stipulations, 26, 278 and 279.

[54] See exhibits 56-60 and 61-64, together with stipulations nos. 281(a) and (b), 282(a) and (b), 285, 288, 289, 290(a) and (b), 291(a) and (b), 292(a) and (b), 293(a) and (b), 299, 300, 304, 305, 313, and 314. These will be found in the Record on Appeal in Documents Nos. 54, 59, and 69.

[55] Jurisdictional statement, Appendix B, Memorandum of Decision, p. 6a.

a more fundamental social value that was before the Supreme Court in the New York City Landmarks Law case.

D.

CONCLUSION

The appellees respectfully submit, therefore, that the appellants present no substantial question for the decision of the Supreme Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX I

Petitions and Applications, General Provisions

Sec. 16-1-46. Form

The form to be followed in the filing of petitions and applications hereunder will vary to the extent necessary to provide for the nature of the legal rights, duties or privileges involved therein. Nevertheless, all petitions and applications shall include the following components:

(a) Statement of application. Each petition or application shall incorporate a statement setting forth clearly and concisely the authorization or other relief sought. The statement shall cite by appropriate reference the statutory provision or other authority under which such authorization or relief is to be granted by the commission. In addition to the specific requirements for particular types of petitions and applications that may hereinafter be stated, the statement of application shall further set forth:

(1) The exact legal name of each person seeking the authorization or relief and the address or principal place of business of each such person. If any applicant or petitioner is a corporation, trust association or other organized group, it shall also give the state under the laws of which it was created or organized.

(2) The name, title, address and telephone number of the attorney or other person to whom correspondence or communications in regard to the petition or application are to be addressed. Notice, orders and other papers may be served upon the person so named; and such service shall be deemed to be service upon the petitioner or applicant.

(3) A concise and explicit statement of the facts on which the commission is expected to rely in granting the authorization or other relief sought, including the public convenience and necessity thereof.

(4) An explanation of any unusual circumstances involved in the petition or application, to which the commission will be expected to direct its particular attention, including the existence of emergency conditions or any request for the granting of interlocutory relief by way of an interim order in the proceeding.

(b) Annexed materials. There shall be attached to the petition or application any exhibits, sworn written testimony, data, models, illustrations and all other materials that the petitioner or applicant deems necessary or desirable to support the granting of the petition or application. In addition, such annexed materials shall also include such exhibits, sworn written testimony, and other data that any statute or these rules may require.

(Effective December 21, 1971)

Sec. 16-1-61. Special components

In addition to the requirements stated in part 1 of this article each applicant for the approval of the commissioners under section 16-43 of the of the general statutes shall contain the following data, either in the statement of applicant or as exhibits annexed thereto and accompanying the application:

(b) A copy of any agreement to merge, consolidate, sell, lease, assign or mortgage.

Approval by the Commission for the Disposition of Certain Assets of Public Service Companies

Sec. 16-43-1. Requirement of approval

(a) No public service company shall, directly or indirectly, sell, lease, assign, or otherwise dispose of or cease to own any interest in land, buildings, real estate fixtures or any other interest in real estate unless it shall first have applied for and received the approval of the commission in the manner provided by the Rules of Practice of the commission.

(b) For the purpose of determining whether or not the proposed transaction is subject to its approval, as aforesaid, the commission shall consider and make a finding of fact as to whether or not the subject real property is an essential part of the franchise of the public service company or is necessary or useful in the performance of the duty of the public service company to the public.

(c) The commission shall consider and make a finding of fact as to whether such interest in real property consists of a parcel of unimproved real property containing three (3) acres or more or is in any way subject to acquisition by any municipality or the state for any purpose authorized by law.

(d) In deciding whether or not to grant such approval the commission shall make a finding as to whether or not such interest in land, buildings, real estate fixtures or other interest in real estate is to be sold, leased, assigned or otherwise disposed of for a consideration that is equal in amount to the fair market value thereof. In the event the commission finds that consideration equals an amount less than such fair market value, then the commission shall further consider whether the acceptance of that consideration by the public

service company adversely affects the interests of the stockholders and owners or of the customers of the public service company.

(Effective June 21, 1972)